

RAMON GARCIA,)	
)	
Petitioner,)	2:08-cv-00480-JCM-PAL
)	
vs.)	ORDER
)	
DWIGHT W. NEVEN, <i>et al.</i> ,)	
)	
Respondents.)	
	/	

I. Procedural History

Petitioner and co-defendant Juan Garcia proceeded to jury trial on August 26, 2003. (Exhibit 32). On September 5, 2003, the jury returned verdicts against petitioner, finding him guilty of:

¹ The exhibits referenced in this order are found in the court's record at ECF Nos. 11-15.

counts I and XXVIII, burglary while in possession of a firearm; counts II and III, robbery with the use of a deadly weapon; counts IV and V, first degree kidnapping with the use of a deadly weapon; count XXVII, conspiracy to commit burglary; count XXIX, conspiracy to commit robbery; count XXX, attempt robbery with the use of a deadly weapon; and counts XXXI, XXXII, and XXXIII, false imprisonment with the use of a deadly weapon. (Exhibits 44 & 45).

On October 23, 2003, the petitioner was sentenced to the following:

count I:	26-120 months prison term
count II:	26-120 months, plus an equal and consecutive term for use of a deadly weapon, concurrent to count I
count III:	26-120 months, plus an equal and consecutive term for use of a deadly weapon, concurrent to counts I and II
count IV:	5 years to life, plus an equal and consecutive term for the use of a deadly weapon, to run consecutive to the other counts
count V:	5 years to life, plus an equal and consecutive term for use of a deadly weapon, to run consecutive to the other counts
count XXVII:	12 months minimum, concurrent to the other counts
count XXVIII:	26-120 months, concurrent to the other counts
count XXIX:	12-48 months, concurrent to the other counts
count XXX:	16-72 months, concurrent to the other counts
count XXXI:	12-48 months, plus an equal and consecutive term for use of a deadly weapon, consecutive to the other counts
count XXXII:	12-48 months, plus an equal and consecutive term for use of a deadly weapon, concurrent to the other counts
count XXXIII:	12-28 months, plus an equal and consecutive term for use of a deadly weapon, consecutive to the other counts, with 784 days credit for time served.

(Exhibits 46 & 47). The judgment of conviction was filed on November 3, 2003. (Exhibit 47).

Petitioner appealed his conviction. (Exhibit 48). On June 23, 2005, the Nevada Supreme Court filed its opinion affirming in part and reversing in part. (Exhibit 51). The Nevada Supreme

1 Court set aside petitioner's convictions for false imprisonment and the conviction for conspiracy to
 2 commit robbery, and affirmed the convictions on the remaining counts. (*Id.*). Remittitur issued on
 3 July 19, 2003. (Exhibit 52). An amended judgment of conviction was filed on February 10, 2006.
 4 (Exhibit 57).

5 On April 13, 2006, petitioner filed a post-conviction habeas petition in state court and an
 6 affidavit in support of the petition. (Exhibits 59 & 60). After a hearing, the state district court
 7 granted the petition as to counts XIII and XXIX, the conspiracy to commit robbery counts, and
 8 denied the petition as to the remaining counts of the information. (Exhibit 62).

9 On September 22, 2006, petitioner appealed the state district court's ruling. (Exhibit 63).
 10 The Nevada Supreme Court filed its order affirming the district court's decision on September 6,
 11 2007. (Exhibit 64). Remittitur issued November 13, 2007. (Exhibit 67).

12 On April 7, 2008, petitioner mailed his federal habeas petition to this court. (ECF No. 3, at p.
 13 1). Petitioner raises eleven grounds for relief in his federal habeas petition. (ECF No. 3). By order
 14 filed June 24, 2009, this court dismissed as moot the entirety of ground 2 of the federal petition.
 15 (ECF No. 17). The court also dismissed as moot the portion of grounds 1 and 3 relating to the
 16 charges of conspiracy. (*Id.*). Respondents have filed an answer to the petition. (ECF No. 18).

17 **II. Federal Habeas Corpus Standards**

18 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),
 19 provides the legal standard for the court's consideration of this habeas petition:

20 An application for a writ of habeas corpus on behalf of a person in
 21 custody pursuant to the judgment of a State court shall not be granted
 22 with respect to any claim that was adjudicated on the merits in State
 court proceedings unless the adjudication of the claim –

23 (1) resulted in a decision that was contrary to, or involved an
 24 unreasonable application of, clearly established Federal law, as
 25 determined by the Supreme Court of the United States; or
 26

1 (2) resulted in a decision that was based on an unreasonable
2 determination of the facts in light of the evidence presented in the State
3 court proceeding.

4 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
5 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
6 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). A state court decision
7 is contrary to clearly established United States Supreme Court precedent, within the meaning of 28
8 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the
9 Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially
10 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different
11 from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting
12 *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

13 A state court decision is an unreasonable application of clearly established United States
14 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies
15 the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies
16 that principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting
17 *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires the state court decision
18 to be more than merely incorrect or erroneous; the state court’s application of clearly established
19 federal law must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

20 In determining whether a state court decision is contrary to, or an unreasonable application of
21 federal law, this court looks to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501
22 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert.*
23 *denied*, 534 U.S. 944 (2001). Moreover, “a determination of a factual issue made by a state court
24 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the
25 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

26 //

III. Discussion

A. Ground 1

Petitioner claims there was insufficient evidence at trial to support his convictions for false imprisonment and kidnapping. (ECF No. 3, at pp. 3-5). This court previously dismissed the portion of ground 1 relating to the charge of false imprisonment, because the conviction on that count was reversed on direct appeal by the Nevada Supreme Court. (ECF No. 17; Exhibit 51, a pp. 6-8). As such, the remaining claim before the court is petitioner's claim that there was insufficient evidence to support the kidnapping charge.

When a habeas petitioner challenges the sufficiency of evidence to support his conviction, the court reviews the record to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000). The *Jackson* standard does not focus on whether a correct guilt or innocence determination was made, but whether the jury made a rational decision to convict or acquit. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Under the *Jackson* standard, the prosecution has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents "a high standard" to habeas petitioners claiming insufficiency of the evidence. *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000).

Sufficiency claims are limited to a review of the record evidence submitted at trial. *Herrera*, 506 U.S. at 402. Such claims are judged by the elements defined by state law. *Jackson*, 443 U.S. at 324 n.16. The reviewing court must respect the exclusive province of the fact-finder to determine the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from proven facts. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). The federal district court must assume the trier of fact resolved any evidentiary conflicts in favor of the prosecution,

1 even if the determination does not appear on the record, and must defer to that resolution. *Jackson*,
2 443, U.S. at 326.

3 Under Nevada state law, first-degree kidnapping is “the willful seizing, confining, or carrying
4 away of a live person.” *Ducksworth v. State*, 113 Nev. 780, 793, 942 P.2d 157, 166 (1997); NRS
5 200.310(1). A kidnapping that occurs in conjunction with a robbery requires movement “over and
6 above” that required for the robbery, and must substantially increase the risk of harm beyond that
7 necessarily present with just robbery. *Wright v. State*, 94 Nev. 415, 417-18, 581 P.2d 442, 443-44
8 (1978). Petitioner has not demonstrated that his actions failed to meet these requirements. In
9 reviewing this claim on direct appeal, the Nevada Supreme Court rejected petitioner’s claim of
10 insufficiency of the evidence. (Exhibit 51, at pp. 9-11). The Nevada Supreme Court found that, at
11 the Fuel Injection Systems robbery, petitioner held the victims at gunpoint for 15 minutes, then
12 moved the victims to the back office, where he ordered them to lie face down and bound them with
13 duct tape. (Exhibit 51, at p. 11). This demonstrates that petitioner moved the victims over and
14 above that required for robbery, and that the risk of harm to the victims was substantially increased,
15 beyond that necessary to commit the robbery, as the victims were held at gunpoint and duct taped. In
16 denying petitioner’s insufficiency of the evidence claim, the Nevada Supreme Court cited to and
17 applied the correct federal standard for insufficiency of the evidence claims, *Jackson*, 443 U.S. 307.
18 (Exhibit 51, at pp. 9-11). The factual findings of the state court are presumed correct. 28 U.S.C. §
19 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court’s ruling was
20 contrary to, or involved an unreasonable application of, clearly established federal law, as
21 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
22 determination of the facts in light of the evidence presented in the state court proceeding. The court
23 denies habeas relief on ground 1 of the petition.

24 //////////////

25 //////////////

1 **B. Ground 3**

2 Petitioner claims that his convictions for both conspiracy to commit robbery and conspiracy
3 to commit burglary were unconstitutional. (ECF No. 3, at pp. 12-14). This court previously
4 dismissed the portion of ground 3 relating to the charge of conspiracy to commit robbery, because
5 the conviction on that count was reversed on direct appeal by the Nevada Supreme Court. (ECF No.
6 17; Exhibit 51).

7 On further review, this court finds that the entirety of ground 3 must be dismissed as moot.
8 Petitioner's claim is that his convictions for both conspiracy to commit robbery and conspiracy to
9 commit burglary violated double jeopardy. (ECF No. 3, pp. 13-14). The Nevada Supreme Court
10 resolved the double jeopardy issue by finding insufficient evidence to support the guilty verdict as to
11 the conspiracy to commit robbery charge. (Exhibit 51, at pp. 19-25). The conviction for conspiracy
12 to commit robbery was therefore vacated. (*Id.*). The federal petition does not challenge the
13 sufficiency of the evidence supporting the conspiracy to commit burglary charge, but rather,
14 advances a double jeopardy argument because petitioner was convicted of two conspiracy counts,
15 when in fact, he is before this court now convicted of only one of those counts. Because the Nevada
16 Supreme Court vacated the conspiracy to commit robbery conviction, the double jeopardy argument
17 asserted in ground 3 of the federal petition is moot. (Exhibit 51, at p. 25). Ground 3 is dismissed as
18 moot, in its entirety.

19 **C. Ground 4**

20 Petitioner contends that his due process rights were violated when the trial court refused to
21 hold a hearing and conduct a full inquiry into his motion to appoint new counsel. (ECF No. 3, at pp.
22 16-20).

23 **1. Relevant Facts**

24 Petitioner had appointed counsel for his criminal trial and pretrial matters. On August 21,
25 2003, petitioner filed a "motion to dismiss counsel." (Exhibit 28). Petitioner complained of
26

1 counsel's alleged failures to investigate the case and communicate with him. (Exhibit 28, at p. 2).
2 The motion was filed at the August 21, 2003, calendar call, the pretrial hearing held days before the
3 start of trial, for which respondents have provided a transcript. (Exhibit 29). At this hearing, trial
4 counsel responded that he had gone to visit petitioner at jail with the use of a Spanish language
5 interpreter. (Exhibit 29, at p. 3). Counsel indicated that he did not leave discovery for petitioner at
6 the jail because he did not want someone else to read it and become a witness. (*Id.*). Petitioner
7 stated that he was not given any paperwork. (*Id.*, at p. 4). The court noted that trial was set to begin
8 days later, and the court stated that it would not allow a delay in the proceeding. (*Id.*). Trial counsel
9 agreed to provide petitioner with "all the paperwork." (*Id.*, at p. 5). The hearing concluded, without
10 an express finding that the motion for new counsel had been denied, but the fact that the court stated
11 it would not delay the trial based on petitioner's motion suggests that the motion was denied.

12 **2. Legal Standard and Nevada Supreme Court's Ruling**

13 The Nevada Supreme Court considered and rejected petitioner's claim on direct appeal.
14 (Exhibit 51, at pp. 11-16). The Nevada Supreme Court analyzed petitioner's claim under the
15 standard set forth in *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004), which is almost entirely
16 derived from the Ninth Circuit's decision in *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir.
17 1998). The Nevada Supreme Court applied the *Young/Moore* three-factor test to petitioner's case
18 and found that he was not entitled to relief. (Exhibit 51, at pp. 11-16). The court considers these
19 three factors when faced with appellate review of a defendant's motion to dismiss counsel: (1) the
20 extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion. *Young*,
21 120 Nev. at 968; *Moore*, 159 F.3d at 1158, 1159 n.3 ("We apply the same test for assessing whether
22 the district court erred in failing to substitute counsel as we do in evaluating whether an
23 irreconcilable conflict exists.").

24 The Nevada Supreme Court made several findings of fact on its review, which are binding on
25 this court. 28 U.S.C. § 2254(e)(1). As to the first factor, the extent of the conflict, the Nevada
26

1 Supreme Court found that petitioner's statements that his attorney never visited him were belied by
2 the record, since trial counsel had visited petitioner on numerous occasions and had communicated
3 with him about a plea offer with the assistance of an interpreter. (Exhibit 51, at pp. 13-14).
4 Regarding the claim that no discovery was made available to petitioner, the Nevada Supreme Court
5 noted that this issue was resolved when trial counsel agreed to provide the documents after petitioner
6 raised the issue with the court. (*Id.*).

7 As to the second factor, the timeliness of the motion, the Nevada Supreme Court found that
8 the motion, filed on the eve of trial, suggested a dilatory motive. (Exhibit 51, at p. 16). Specifically,
9 the Nevada Supreme Court found as follows:

10 Here, Garcia filed his motion in open court at the August 21, 2003
11 calendar call, just days before his trial was set to begin. As noted
12 above, Sciscento was appointed to represent Garcia in January 2003,
13 and in the ensuing months he spoke with defendant regarding
14 discovery and plea negotiations. However, at no time did Garcia
15 attempt to notify the court that there was a conflict with his counsel.
16 Garcia had months to express his concerns to his counsel and the court,
17 but he did not do so. He waited until the eve of trial and filed his
18 motion in open court – a fact suggestive of a dilatory motive. The
19 record indicates that Garcia's motion, although timely in the sense that
20 it was filed before the actual start of the trial, would have resulted in
21 unnecessary inconvenience and delay, if granted.

22 (Exhibit 51, at pp. 14-15) (footnotes and citations omitted).

23 As to the third factor, the adequacy of the trial court's inquiry, the Nevada Supreme Court
24 found that petitioner did not want a fuller hearing than what he received, as he "refused to speak to
25 the court regarding the matter, stating, 'I just want to turn this paperwork into you, I don't want to
26 speak.'" (Exhibit 51, at p. 15). "His attorney, Mr. Sciscento, noted that he had spoken with Garcia
and reviewed the discovery with him through an interpreter." (*Id.*, at p. 16). The Nevada Supreme
Court found that the "real concern" was that petitioner wanted a copy of the discovery, which
counsel agreed to provide. (*Id.*). The Nevada Supreme Court concluded that the trial court's limited
inquiry was adequate given the circumstances of the motion. (*Id.*).

1 The factual findings of the Nevada Supreme Court are presumed correct. 28 U.S.C. §
2 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's
3 ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as
4 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
5 determination of the facts in light of the evidence presented in the state court proceeding. This court
6 denies habeas relief as to ground 4 of the petition.

7 **D. Ground 5**

8 Petitioner contends that his right to confrontation was violated when the trial court prohibited
9 him from cross-examining two witnesses. (ECF No. 3, at pp. 21-23).

10 Generally, the admissibility of evidence is a matter of state law, and is not reviewable in a
11 federal habeas corpus proceeding. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Middleton v. Cupp*,
12 768 F.2d 1083, 1085 (9th Cir.), *cert. denied*, 478 U.S. 1021 (1985). The role of the federal court is
13 "limited to determining whether the admission of evidence rendered the trial so fundamentally unfair
14 as to violate due process." *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998); *see Fuller v.*
15 *Roe*, 182 F.3d 699, 703 (9th Cir. 1999).

16 The Sixth Amendment's Confrontation Clause provides that: "In all criminal prosecutions,
17 the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const.
18 Amend. VI. "The right to confront and cross-examine witnesses and to call witnesses in one's own
19 behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S.
20 284, 294 (1973). Moreover, the right to confrontation is limited to specific guarantees – that a
21 criminal defendant will be able to assess the credibility of a live, in-court, face-to-face questioning.
22 *See Crawford v. Washington*, 541 U.S. 36 (2004). The right to cross-examination under the
23 Confrontation Clause is a "functional" right which falls into two categories: "cases involving the
24 admission of out-of-court statements and cases involving restrictions imposed by law or by the trial
25 court of the scope of cross-examination." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (*quoting*
26

1 *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985)). “Of course, the Confrontation Clause guarantees
2 only ‘an *opportunity* for effective cross-examination, not cross-examination that is effective in
3 whatever way, and to whatever extent, the defense might wish.’” *Stincer*, 482 U.S. at 740 (*quoting*
4 *Fensterer*, 474 U.S. at 20 (emphasis in original)).

5 In the instant case, petitioner claims that the trial court prohibited him from cross-examining
6 two witnesses that testified at trial against petitioner’s brother Juan, pertaining to two robberies for
7 which petitioner was not charged. As background, petitioner was tried with his brother during a joint
8 trial. Petitioner faced charges pertaining to two of a total of four separate robberies. It is undisputed
9 that as to the two other robberies, petitioner was not involved, but his brother Juan was identified as
10 the sole perpetrator of those crimes.

11 On August 29, 2003, trial counsel raised an issue that he was not allowed to cross-examine
12 witnesses pertaining to the “Los Alamitos” and “B&H Radiators” robberies, neither of which
13 involved petitioner. (Exhibit 37, at p. 73). The record reflects that Morales testified for B&H
14 Radiators earlier that day, and when co-counsel finished his examination, petitioner’s counsel was
15 given an opportunity to conduct a cross-examination, but declined to do so. (Exhibit 37, at p. 37).
16 Next, witness Luna testified for B&H Radiators. Again, the court gave petitioner’s attorney the
17 opportunity to cross-examine the witness, and trial counsel declined. (Exhibit 37, at p. 72). Trial
18 counsel stated that he was still “not clear” whether he had a right to cross-examine witnesses who
19 did not implicate his client, petitioner in the instant case. (Exhibit 37, at p. 74). A conversation then
20 occurred regarding amending the charges to make clear that petitioner was not involved in either the
21 Los Alamitos or B&H Radiators robberies. (Exhibit 37, at p. 74).

22 Earlier, on the morning of August 27, 2003, two witnesses testified. Lozada testified for
23 Fuel Systems, which is one of the robberies in which petitioner was implicated. (Exhibit 34, at p.
24 38). Petitioner’s counsel conducted a cross-examination of that witness. (Exhibit 34, at p. 87). The
25
26

1 other witness who testified was Barre, also from Fuel Systems. (Exhibit 34, at p. 117). Petitioner's
2 counsel conducted a cross-examination of Barre. (Exhibit 34, at p. 129).

3 Thereafter, and on August 28, 2003, several more witnesses testified. Witness Nunez
4 testified for Los Alamitos. (Exhibit 36, at p. 20). Although that crime did not involve petitioner, his
5 lawyer was given the chance to cross-examine the witness, but he declined to do so. (Exhibit 36, at
6 p. 53). Witness Fox testified as the crime scene analyst and was cross-examined by petitioner's trial
7 counsel. (Exhibit 36, at p. 74). Witness Junior Nunez testified for Los Alamitos. (Exhibit 36, at p.
8 79). Again, petitioner's counsel was given the chance to conduct a cross-examination and declined
9 to do so. (Exhibit 36, at p. 103).

10 Additionally, witness Lum testified as a crime scene analyst, and was cross-examined by trial
11 counsel. (Exhibit 36, at p. 117). Witness Ayala then testified for Los Alamitos. (Exhibit 36, at p.
12 119). Petitioner's counsel was given a chance to conduct cross-examination, and even started to do
13 so, before declaring that he was "waiving" his cross-examination. (Exhibit 36, at p. 131). Finally,
14 witness Hansen testified for B&H Radiators. (Exhibit 36, at p. 133). As with every other witness in
15 the case, the court gave petitioner's counsel the opportunity to cross-examine this witness. (Exhibit
16 36, at p. 175). Petitioner's trial counsel declined to cross-examine Hansen. (Exhibit 36, at p. 175).

17 Every witness that testified prior to the prohibition of cross-examination raised in the petition
18 reveals that petitioner's claims are belied by the record. Petitioner's counsel had the opportunity to
19 cross-examine every witness that testified up to that point. The record reflects that, as to those
20 witnesses who did not testify against petitioner, trial counsel could have, but elected not to conduct a
21 cross-examination. Petitioner's claim that he was prohibited from cross-examining witnesses is
22 belied by the record.

23 In analyzing this claim, the Nevada Supreme Court cited to and applied the correct United
24 States Supreme Court authority, *Chambers v. Mississippi*, 410 U.S. 284 (1973). (Exhibit 51, at p.
25 18). The Nevada Supreme Court rejected petitioner's claim, concluding that petitioner had no right
26

1 to cross-examine witnesses, other than those testifying against him. (Exhibit 51, at pp. 17-19). It
2 was not objectively unreasonable for the Nevada Supreme Court to find that the witnesses at issue
3 did not testify against petitioner, and that petitioner had no right to cross-examine such witnesses.
4 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was
5 contrary to, or involved an unreasonable application of, clearly established federal law, as
6 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
7 determination of the facts in light of the evidence presented in the state court proceeding.

8 Finally, a Confrontation Clause violation is subject to harmless error analysis. *United States*
9 *v. Bowman*, 215 F.3d 951, 961 (9th Cir. 2000). "In the context of habeas petitions, the standard of
10 review is whether a given error 'had substantial and injurious effect or influence in determining the
11 jury's verdict.'" *Christian v. Rhode*, 41 F.3d 461, 468 (9th Cir. 1994) (quoting *Brecht v. Abrahamson*,
12 507 U.S. 619, 637 (1993)).

13 Petitioner suggests that with cross-examination, he could have established that the "pattern of
14 conduct" of the two robberies in which he was not involved mirrored that of the robberies in which
15 he was allegedly involved, and that this would suggest that his brother Juan committed all of the
16 crimes. Yet, petitioner's counsel did not argue misidentification. Additionally, as pointed out by the
17 Nevada Supreme Court, there was nothing stopping petitioner's counsel from calling the witnesses in
18 question during his defense case-in-chief. (Exhibit 51, at p. 19). The failure to have done so belies
19 petitioner's claim of prejudice. Finally, petitioner does not identify the specific witnesses from
20 whom he would have obtained testimony or how such witnesses would have testified. To the extent
21 that petitioner sought evidence that he was not involved in the Los Alamitos or B&H Radiators
22 crimes, or how those crimes were committed, that evidence was already presented. Petitioner has
23 failed to demonstrate prejudice. Thus, even if petitioner was denied the right to cross-examine
24 witnesses, and this violated his right to confront witnesses who did not testify against him, the error
25
26

1 did not have a substantial and injurious effect on the jury's verdict. This court denies habeas relief
2 on ground 5 of the petition.

3 **E. Ground 6**

4 Petitioner contends that Nevada's reasonable doubt instruction is unconstitutional. (ECF No.
5 3, at pp. 25-28). The exact same instruction was found to comply with due process, as determined by
6 the Ninth Circuit in *Ramirez v. Hatcher*, 136 F.3d 1209 (9th Cir. 1998), *cert. denied* 525 U.S. 967
7 (1998). Ground 6 is without merit and is denied.

8 **F. Ground 7**

9 Petitioner alleges that his trial counsel was ineffective for failing to seek a severance from the
10 joint trial with petitioner's brother, based on the allegation that petitioner looked like his brother and
11 was therefore found "guilty by association." (ECF No. 3, at pp. 30-32).

12 Ineffective assistance of counsel claims are governed by the two-part test announced in
13 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
14 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the
15 attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the
16 Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams v.*
17 *Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
18 ineffectiveness, the defendant must show that counsel's representation fell below an objective
19 standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a
20 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
21 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
22 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be
23 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in
24 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's
25
26

1 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.

2 *Id.*

3 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
 4 performance of counsel resulting in prejudice, "with performance being measured against an
 5 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*
 6 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
 7 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
 8 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,
 9 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of
 10 reasonable professional assistance. *Id.*

11 The United States Supreme Court recently described federal review of a state supreme court's
 12 decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen v. Pinholster*,
 13 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). The
 14 Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's performance
 15 through the "deferential lens of § 2254(d)." *Id.* at 1403 (internal citations omitted). Moreover,
 16 federal habeas review of an ineffective assistance of counsel claim is limited to the record before the
 17 state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401.

18 The Nevada Supreme Court addressed the claim raised in ground 7, as follows:

19 First, Garcia claimed that trial counsel was ineffective for failing to
 20 move to sever his trial from his brother's trial. Garcia claimed that the
 21 trials should have been severed because Garcia and his brother, Juan
 22 Garcia, looked alike, which made misidentification more likely.
 Garcia also claimed that the joint trial affected his decision to testify,
 resulting in a Bruton violation, because he did not want to assist in the
 criminal prosecution of his brother.

23 Garcia failed to demonstrate that trial counsel's performance was
 24 deficient or that he was prejudiced. A defendant is entitled to a
 25 severed trial if he presents a sufficient showing of facts demonstrating
 26 that substantial prejudice would result from a joint trial. Garcia did not
 demonstrate that he was substantially prejudiced by the joint trial or
 that the joint trial was improper. Despite Garcia's assertions about the

potential for misidentification, there were significant differences in Garcia's and his brother's physical appearances. Further the State's witness Fernando Lozada, who Garcia alleged exonerated him at trial, testified at trial that he was one hundred percent certain that Garcia was the man who robbed him at gunpoint. Finally, Garcia failed to show that he was prevented from testifying merely because he did not want to implicate his brother and also failed to show that a Bruton violation occurred. Therefore, we conclude that the district court did not err in denying this claim.

(Exhibit 64, at pp. 2-3) (footnotes and citations omitted). The Nevada Supreme Court cited to and applied the correct federal standard for ineffective assistance of counsel claims, *Strickland v. Washington*, 466 U.S. 668 (1984). (Exhibit 64, at p. 2, n.3). The Nevada Supreme Court further cited to and correctly analyzed petitioner's claim under *Bruton v. United States*, 391 U.S. 123 (1968). (Exhibit 64, at p. 3). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Habeas relief is denied as to ground 7.

G. Ground 8

Petitioner claims that his trial counsel was ineffective for failing to seek to exclude evidence seized from a search of petitioner's brother's car. (ECF No. 3, at pp. 34-35). The Nevada Supreme Court rejected this claim, ruling as follows:

Second, Garcia claimed that his trial counsel was ineffective for failing to challenge the illegal search of the vehicle in which his brother was traveling when arrested. Garcia claimed that the firearms discovered inside the vehicle and the evidence discovered in a subsequent search of his apartment should have been excluded pursuant to the fruit of the poisonous tree doctrine. Garcia failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The record indicates that Garcia's brother consented to a search of the vehicle. Garcia was not in the vehicle when it was stopped or searched, and Garcia did not assert an ownership interest in the vehicle. Accordingly, the district court did not err in denying this claim.

(Exhibit 64, at p. 4) (footnotes and citations omitted). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). The Nevada Supreme Court cited to and applied the correct federal standard for ineffective assistance of counsel claims, *Strickland v. Washington*, 466 U.S. 668 (1984). (Exhibit 64, at p. 2-5). The Nevada Supreme Court also cited to and correctly analyzed petitioner's claim under *Rakas v. Illinois*, 439 U.S. 128 (1978). (Exhibit 64, at p. 4). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This court denies habeas relief on ground 8.

H. Ground 9

Petitioner claims that his trial counsel was ineffective for failing to argue a lack of probable cause to support his arrest, or to argue delay in terms of a probable cause determination. (ECF No. 3, at pp. 37-38). The Nevada Supreme Court rejected this claim, ruling as follows:

Third, Garcia claimed that defense counsel was ineffective for failing to challenge Garcia's arrest for lack of probable cause. Garcia claimed that he was arrested based on the mere fact that he was living in an apartment with his brother. Garcia failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The record indicates that there was probable cause to arrest Garcia. In particular, two victims identified Garcia, in a photographic lineup, as one of the perpetrators of the robbery. Several items taken during the robberies were recovered in the apartment that Garcia shared with his brother. Given this evidence, there is no indication that a challenge to the probable cause in support of the arrest would have been successful. Thus, the district court did not err in denying this claim.

(Exhibit 64, at pp. 4-5) (footnotes and citations omitted). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling

1 was based on an unreasonable determination of the facts in light of the evidence presented in the
2 state court proceeding. Habeas relief is denied as to ground 9.

3 **I. Ground 10**

4 Petitioner claims that counsel was ineffective for failing to challenge an eyewitness'
5 photographic identification of him on the basis that he did not have an attorney present during the
6 identification. (ECF No. 3, at pp. 40-41). The Nevada Supreme Court addressed this claim:

7 Fourth, Garcia claimed that defense counsel was ineffective in failing
8 to challenge the victim's initial pretrial identification of Garcia in a
9 photographic lineup. Specifically, Garcia claimed that defense counsel
10 was not present at the identification, and the State's witness Lozada
11 did not identify Garcia as the man who robbed him. Garcia failed to
12 demonstrate that trial counsel's performance was deficient or that he
13 was prejudiced. Counsel is not required to be present at a
14 photographic identification and Garcia's Sixth Amendment right to
15 counsel had not attached at that point. Garcia further failed to
16 demonstrate that a challenge to the legality of the pretrial identification
17 had a reasonable likelihood of success. Accordingly, the district court
18 did not err in denying this claim.

19 (Exhibit 64, at p. 5) (footnotes and citations omitted). The Nevada Supreme Court cited to and
20 applied the correct federal standard for ineffective assistance of counsel claims, *Strickland v.*
21 *Washington*, 466 U.S. 668 (1984). (Exhibit 64, at p. 2-5). The Nevada Supreme Court also cited to
22 and correctly analyzed petitioner's claim under *Barone v. State*, 109 Nev. 1168, 866 P.2d 291
23 (1993), which relies heavily on *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding that there is no
24 constitutional right to counsel during a pre-indictment photographic lineup). (Exhibit 64, at p. 5).
25 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was
26 contrary to, or involved an unreasonable application of, clearly established federal law, as
determined by the United States Supreme Court, or that the ruling was based on an unreasonable
determination of the facts in light of the evidence presented in the state court proceeding. This court
denies habeas relief on ground 10.

////////

////////

1 **J. Ground 11**

2 Petitioner claims ineffective assistance of appellate counsel. (ECF No. 3, at pp. 43-46).
3 Petitioner claims that appellate counsel failed to seek a rehearing on direct appeal regarding whether
4 the victims in one of the robberies were moved outside a building, rather than inside a building.
5 (*Id.*). The *Strickland* standard, discussed earlier in this order, applies to challenges of effective
6 appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no
7 constitutional duty to raise every non-frivolous issue requested by the client. *Jones v. Barnes*, 463
8 U.S. 745, 751-54 (1983).

9 In reviewing petitioner's claim of ineffective assistance of appellate counsel, the Nevada
10 Supreme Court ruled:

11 Garcia claimed that appellate counsel was ineffective for failing to file
12 a petition for rehearing challenging this court's decision in his direct
13 appeal. In the opinion in his direct appeal, this court stated that Garcia
14 "ordered the two victims outside the building to the back of a truck,
15 where he held them for 15 minutes at gunpoint." (Emphasis added).
16 Garcia argued that appellate counsel should have argued that this court
17 relied on the erroneous fact that the victims were moved outside the
18 building in determining that the convictions for first-degree kidnapping
19 were not incidental to the robbery.

20 Garcia has failed to show that appellate counsel's performance was
21 deficient or that he was prejudiced. In *Mendoza v. State*, this court
22 held that dual convictions for first-degree kidnapping and robbery are
23 appropriate including "where the movement or restraint serves to
24 substantially increase the risk of harm to the victim over and above
25 that necessarily present in a associated offense . . . [or] where the
26 restraint or movement of the victim substantially exceeds that required
27 to complete the associated crime charged." In this case, Garcia and his
28 accomplice held the victims at gunpoint for fifteen minutes, took them
29 into a back room, ordered them to lie facedown, and bound them with
30 duct tape. The movement and restraint exceeded that required to
31 commit the act of robbery itself. The fact that the victims were moved
32 inside and not outside the building is not material and did not affect
33 our conclusion that dual convictions for kidnapping and robbery were
34 appropriate. Accordingly, the district court did not err in denying this
35 claim.

36 (Exhibit 64, at pp. 6-7) (emphasis in original) (footnotes and citations omitted).

1 The Nevada Supreme Court applied the correct federal standard for ineffective assistance of
2 appellate counsel claims. (Exhibit 64, at pp. 5-7). The factual findings of the state court are
3 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
4 the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of,
5 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
6 was based on an unreasonable determination of the facts in light of the evidence presented in the
7 state court proceeding. This court denies habeas relief as to ground 11.

8 **IV. Certificate of Appealability**

9 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
10 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
11 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 9th Cir. 2001). Generally, a
12 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
13 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
14 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's
15 assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at 484). In
16 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
17 debatable among jurists of reason; that a court could resolve the issues differently; or that the
18 questions are adequate to deserve encouragement to proceed further. *Id.* This court has considered
19 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
20 certificate of appealability, and determines that none meet that standard. The court will therefore
21 deny petitioner a certificate of appealability.

22 **V. Conclusion**

23 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus is **DENIED**
24 **IN ITS ENTIRETY.**

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY**.

Dated this 13th day of January, 2012.

21